Filed 5/12/10 Malone v. Merle Norman Cosmetics CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARK MALONE, Plaintiff and Appellant, v. MERLE NORMAN COSMETICS, INC., Defendant and Respondent.	B212059 (Los Angeles County Super. Ct. No. BC381512)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Affirmed in part and reversed in part.

Knickerbocker Law Corporation and Richard L. Knickerbocker for Plaintiff and Appellant.

Baker, Keener & Nahra, Robert C. Baker, Melissa S. Fink and James D. Hepworth for Defendant and Respondent.

Plaintiff Mark Malone appeals the dismissal of his action for wrongful termination after the trial court sustained defendant Merle Norman Cosmetics' (Merle Norman) demurrer to his second amended complaint without leave to amend. He contends he pleaded with sufficient specificity to withstand demurrer his claims for breach of implied contract, breach of oral contract, breach of the implied covenant of good faith and fair dealing, and wrongful termination in violation of public policy. We affirm the judgment dismissing Malone's contract claims, but reverse judgment on his claim for wrongful termination in violation of public policy.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Plaintiff's Second Amended Complaint

Plaintiff's second amended complaint alleged he was employed by Merle Norman to fly its corporate jet, a Gulfstream II, as a full-time pilot from September 16, 1996 until his termination on May 1, 2007. Before flying for Merle Norman, plaintiff flew for 20th Century Fox Studios and Walt Disney Productions.

Plaintiff alleged Merle Norman was a California corporation and that Merle Norman's aviation division was located at the Van Nuys Airport. He further alleged Arthur O. Armstrong was Merle Norman's president and CEO; Jack Nethercutt was its president and chairman of the board; Kevin Wood was Merle Norman's director of maintenance for its corporate jet; Mary Jo Sirota was Merle Norman's vice president of aviation; Alan Goldman was the chief pilot; and Dean Melnick was vice president of human resources.

Plaintiff alleged that he had an implied in fact and express oral contract with Merle Norman, based upon representations of Armstrong, Nethercutt, Saltzman, Sirota, and Goldman, that he would be permanently employed as a Gulfstream II pilot for as long as the company had an airplane or a flight department and that he would not be discharged except for good cause. Plaintiff gave up other employment based upon Merle Norman's representations.

Such implied agreement was evidenced by Merle Norman's "corrective, non-punitive and progressive personnel policies or practices," plaintiff's longevity of service; the actions

or communications of Merle Norman reflecting assurances of continued employment; Merle Norman's encouragement to plaintiff that he forbear from accepting employment elsewhere; his receipt from Nethercutt and Armstrong of certificates representing his five and ten-year anniversaries with Merle Norman; and the practices of the industry in which plaintiff was employed that pilots have full-time positions so that they would be available on short notice. Plaintiff alleged that at no time did Merle Norman suggest or imply that his employment would be subject to arbitrary termination; his performance was periodically reviewed and he consistently received positive performance evaluations. Two weeks before his termination, plaintiff received an excellent review from Goldman, who told him his performance was "excellent, as always" and plaintiff was "the best of anyone" Goldman had flown with.

Furthermore, Merle Norman, through Armstrong, Nethercutt, Sirota and Goldman, expressly and orally promised plaintiff, that he would not be terminated except for good cause. Plaintiff was repeatedly told by Nethercutt and Goldman that he had permanent employment, absent good cause for termination, as long as Merle Norman had an airplane. In an undated and unspecified writing, plaintiff alleges that Armstrong wrote, "Merle Norman has agreed that if the Aviation Department should be eliminated while you are part of the Department, and your employment by Merle Norman is terminated as a result of the Department's elimination, you would continue to receive weekly payment of your salary, and be entitled to all employee benefits, for a period of six months from the date of termination of your employment, or until such earlier date as you found other employment."[1]

Further, plaintiff alleged that Federal Aviation Administration (FAA) regulations governed the operation of Merle Norman's Gulfstream II; adherence to such regulations was

---

[1] Plaintiff's first amended complaint alleged the letter was dated August 20, 1998, and also stated, "Except as described here, you understand that your employment by Merle Norman continues to be terminable by you or by Merle Norman at any time, with or without cause." Plaintiff contended the letter gave him a term of employment only limited by the elimination of Merle Norman's Aviation Department. The trial court's ruling on Merle Norman's demurrer to his first amended complaint noted that this excluded language (not included in the second amended complaint) defeated plaintiff's claims of an employment for a specified term, thereby reducing his allegations to those of an implied or express contract not to terminate except for cause.

of public importance and necessary to the safety of passengers and persons on the ground. Plaintiff alleged he had complained to Merle Norman, through Sirota and Goldman that it was violating of FAA regulations by the following conduct: falsification of records by Goldman, including the underreporting of landings and engine hours; failure to maintain the Gulfstream II aircraft; failure to provide adequate charts; failure to provide a qualified co-pilot; and improper storage of baggage and cargo. Plaintiff also alleged that he reported safety needs, including the need to obtain noise canceling headsets; intercoms; maps, collision avoidance systems; and navigation systems. Plaintiff alleged that he believed Sirota was fired as a result of her relaying to Merle Norman his safety concerns; she was replaced in her position by Goldman; and Goldman in turn failed to implement safety measures because Nethercutt disapproved of them. After Sirota's termination, plaintiff continued to complain to Goldman, and alleged that it was not company policy to complain to "higher ups" about safety considerations. Goldman, however, failed to relay these complaints to senior management out of fear for his own termination. Plaintiff cited to numerous specific FAA regulations in his complaint and alleged specific complaints that he made to Goldman.

On May 1, 2007, in spite of its assurances that he would continue in its employ as a pilot, Merle Norman discharged plaintiff, informing him that it had eliminated his position and that it was going to use a part-time pool of pilots. Plaintiff alleged this was a pretext because he was not allowed to apply for any of these part-time positions. Subsequently, Merle Norman discharged him on the basis his performance being unsatisfactory.

2. Defendant's Demurrer

Defendants demurred, contending that (1) plaintiff's implied-in-fact contract claim failed because allegations that his employment was "permanent" under California law meant that it was "at-will;" further, plaintiff had failed to allege with specificity facts supporting an implied-in-fact contract, namely the policies and practices of Merle Norman, the practices within the relevant industry, and the other employment opportunities forgone; therefore plaintiff's mere recitation of the *Foley* factors failed to show an implied agreement. Further, the 1998 Armstrong letter alleged in the complaint was incomplete and if considered in full reiterated that employment was at-will; (2) plaintiff's alleged oral contract was fatally

uncertain because plaintiff did not allege the names of the persons making the contract and their authority to enter into a contract on behalf of Merle Norman, or the specific terms of the agreement; (3) plaintiff could not establish a breach of the implied covenant of good faith and fair dealing because that claim depended upon an underlying contract for its breach; and (4) plaintiff failed to state a claim for wrongful termination in violation of public policy because he did not establish a nexus between his complaints and his termination because the alleged violations of FAA regulations occurred in 2005 and 2006, while defendant was terminated in 2007. Defendants also moved to strike portions of the complaint and plaintiff's punitive damages allegations.

Plaintiff opposed, arguing that (1) his allegations of permanent employment were not inconsistent with the existence of an implied-in-fact contract, and that the totality of the circumstances alleged the existence of such a contract; (2) his allegations of an oral contract were sufficiently certain; (3) his allegations of contract breach supported his claim for breach of the implied covenant of good faith and fair dealing; and (4) he alleged a sufficient nexus between claimed FAA regulation breaches and his termination.

Defendant's reply argued that although a demurrer normally tested the legal sufficiency of a complaint's allegations, in ruling on a demurrer a court may consider prior complaints where a plaintiff has made inconsistent statements or material omissions between different versions of the complaint. Defendant relies on plaintiff's omission of the full text of the 1998 Armstrong letter. Defendant also contended plaintiff's allegations of unspecified promises by unspecified persons who did not have the authority to act on behalf of Merle Norman did not allege an oral contract. Finally, the wrongful termination in violation of public policy claim failed because the allegations did not allege to whom the complaints were made and whether such persons actually terminated plaintiff or had the authority to do so; instead, the complaint alleges plaintiff complained to Goldman, but that Goldman himself failed to relay the complaints because he feared for his own termination.

Prior to the hearing, the court issued a tentative ruling in which it sustained the demurrer to all causes of action except the claim for wrongful termination in violation of public policy. The court stated it found in the two prior versions of the complaint plaintiff

had failed to allege a nexus between the complaints and his termination. The court found plaintiff's new allegation in the second amended complaint that "'In retaliation for Plaintiff's complaints concerning Federal Aviation Regulations, adopted for the benefit of pilots, passengers, and the general public, and Plaintiff's complaints concerning the denial of a safe place to work, and out of fear that if he continued to be employed he would advise the FAA and other agencies of these violations, Defendant wrongfully terminated Plaintiff's employment and denied him further employment'" were insufficient to establish nexus, but that plaintiff might be able to amend.

At the hearing, the court advised plaintiff that Merle Norman could not be liable for wrongful termination based on knowledge it did not have. The court concluded plaintiff had failed to establish a nexus between his complaints of FAA regulation violations and his termination, and sustained the demurrer without leave to amend to all of plaintiff's claims. The court found the motion to strike moot, and entered judgment for Merle Norman.

DISCUSSION

I. STANDARD OF REVIEW

The function of a demurrer is to test the sufficiency of a pleading as a matter of law, and we apply the de novo standard of review in an appeal following the sustaining of a demurrer without leave to amend. (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A complaint is sufficient if it alleges ultimate, rather than evidentiary facts, but the plaintiff must set forth the essential facts of his or her case with reasonable precision and particularity sufficient to acquaint the defendant of the nature, source, and extent of the plaintiff's claim. Legal conclusions are insufficient. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550–551.) We assume the truth of the allegations in the complaint, but do not assume the truth of contentions, deductions, or conclusions of law. The trial court errs in sustaining a demurrer if the plaintiff has stated a cause of action under any possible legal theory, and it is an abuse of discretion for the court to sustain a demurrer without leave to amend if the plaintiff has shown there is a reasonable possibility a defect can be cured by amendment. (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

Where the amended complaint omits facts alleged in a prior complaint, or pleads facts inconsistent with a prior complaint, any inconsistency must be explained, otherwise we will read into the amended complaint such omitted or inconsistent facts. (*Vallejo Development Co. v. Beck Development Co*. (1994) 24 Cal.App.4th 929, 946; *Owen v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383–384 [prior self-destructive allegations in an earlier pleading are read into a later pleading, and the allegations inconsistent therewith are treated as sham and disregarded].) "The purpose of the [sham pleading] doctrine is to enable the courts to prevent an abuse of process. . . . The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts." (*Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751; see also *Tognazzi v. Wilhelm* (1936) 6 Cal.2d 123, 127.)

II. WRONGFUL TERMINATION: CONTRACT CLAIMS

A. Breach of Implied Contract

In California, there is a presumption that employment is at will, absent an "express oral or written agreement specifying the length of employment or the grounds for termination." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677 (*Foley*); Lab. Code § 2922.) However, an employer and an employee are free to depart from the statutory presumption and specify that the employee will be terminated only for good cause, either by an express, or an implied, contractual agreement. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336 (*Guz*).) "Generally, the existence of an implied-in-fact contract requiring good cause for termination is a question for the trier of fact . . . ." (*Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1275, disapproved on another ground by *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853, fn.19.)

To determine whether Malone has alleged an implied-in-fact contract not to terminate him, we look to the parties' conduct "in light of the subject matter and surrounding circumstances." (*Foley*, *supra*, 47 Cal.3d at p. 681; *Guz*, *supra*, 24 Cal.4th at p. 337.) We look at the totality of the parties' relationship over the course of the plaintiff's employment to determine whether such an agreement exists. (*Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 751–752, disapproved on other grounds, *Guz*, *supra*, 24 Cal.4th 317.)

Factors showing an implied-in-fact contract include: (1) the employer's personnel policies and practices; (2) the employee's length of service; (3) actions or communications of the employer indicating assurances of continued employment; (4) practices in the industry in which the employee is employed; (5) whether the employee gave consideration in exchange for the employer's promise. (*Foley*, *supra*, 47 Cal.3d at pp. 680–681.) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.)

In considering the employee's length of employment, no particular length of service is required.[2] (*Foley*, *supra*, 47 Cal.3d at p. 681.) However, longevity of service is not sufficient by itself to establish an implied contract. (See, e.g., *Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 368 [nine years employment insufficient to rebut presumption of at-will employment].) However, the employer may indicate by words or conduct that an employee's longevity, combined with other factors, will protect the employee from discharge without cause. (*General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1178.) In *General Dynamics*, the employee was hired with an expectation of permanent employment if his performance was satisfactory; he was promised job security and substantial retirement benefits; and he regularly received outstanding performance reviews and salary increases. (*Ibid.*) Similarly, an employee established an implied-in-fact contract where the employer repeatedly assured him that he could have a job as long as the

---

[2] In the employment context, a contract for "permanent" employment is deemed to be an at-will contract. (*Foley*, *supra*, 47 Cal.3d at p. 678 ["'a contract for permanent employment, for life employment, for so long as the employee chooses, or for other terms indicating permanent employment, is interpreted as a contract for an indefinite period terminable at the will of either party'"].) Thus, to the extent plaintiff has alleged he had a contract for "permanent" employment with Merle Norman, or for as long as it had an airplane, we interpret such allegations to mean that he acknowledged the at-will nature of his agreement, but contends the at-will presumption was rebutted by other factors showing an implied or oral agreement not to terminate him except for cause. (See *Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal.App.3d 61, 66.)

employee chose to work for the employer. (*Stillwell v. Salvation Army* (2008) 167 Cal.App.4th 360, 381–382.)

Here, Malone has alleged an implied-in-fact contract based upon Merle Norman's "corrective, non-punitive and progressive personnel policies or practices;" plaintiff's longevity of service; the actions or communications of Merle Norman reflecting assurances of continued employment; Merle Norman's encouragement to plaintiff that he forbear from accepting employment elsewhere; and the practices of the industry in which plaintiff was employed that pilots have full-time positions; and his repeated positive performance evaluations.

These allegations are not sufficiently specific to create an implied contract to terminate only for good cause, and constitute only legal conclusions.[3] Aside from specific allegations of positive reviews from Goldman, who did not have authority to act for Merle Norman, and his certificates of dedicated service representing longevity of employment, Malone has not alleged any of the following: the particular personnel policies upon which he relies to rebut the at-will presumption; the employment he passed up to work at Merle Norman; the persons authorized to make representations of continued employment or when such representations were made; the specific practices of the industry not to terminate its pilots except for good cause; or that persons authorized to act on behalf of Merle Norman gave him positive reviews. As *Guz* pointed out, not every "vague combination of *Foley* factors, shaken together in a bag, necessarily allows a finding that the employee had a right to be discharged only for good cause . . . . [¶] On the contrary, 'courts seek to enforce the *actual* understanding' of the parties to an employment agreement." (*Guz, supra*, 24 Cal.4th at p. 337.)

---

[3] We interpret Armstrong's 1998 letter merely to set forth the presumption of Labor Code section 2922 that plaintiff's employment was at-will. Although it precludes an express agreement for an employment contract of a definite term, the 1998 letter does not preclude plaintiff from alleging a later implied or express agreement arose that he would only be terminated for cause.

B. Breach of Express Oral Contract

An employer's power to terminate an at-will employee may also be limited if the employee expressly promises, orally or in writing, not to terminate the employee. (*Guz, supra*, 24 Cal.4th at p. 336.) We determine the terms of such an agreement by evaluating the objective manifestations of the parties rather than their subjective unexpressed beliefs. (*Alexander v. Codemasters Group, Limited* (2002) 104 Cal.App.4th 129, 150.) An express employment agreement may specify employment for a specific length of time, and limits the employer's to discharge the employee within that time period. (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 57.) The length of employment must be specified. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 969–970.)

Here, plaintiff has alleged that he would have a job as long as Merle Norman had a corporate jet. However, he cannot plead around the language, omitted from his first amended complaint, that Armstrong's 1998 letter states that his employment was at-will, and terminable with or without cause. Furthermore, he does not allege any subsequent specific promises made concerning the length or terms of his employment such that an express contract was created. His claim for an express agreement therefore fails.

C. Breach of Implied Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing, implied in every contract, requires that each party will not do anything that will deprive the other party of the benefits of the contract. (*Foley, supra*, 47 Cal.3d at p. 690.) The covenant only protects those benefits promised. In the employment context, the covenant prevents the employer from frustrating the employee's rights under the contract. (*Kelecheva v. Multivision Cable T.V. Corp.* (1993) 18 Cal.App.4th 521, 531–532.) There can be no claim for breach of the implied covenant absent a showing of breach of the underlying contract. (*Guz, supra*, 24 Cal.4th at p. 350.) Here, because plaintiff cannot establish a breach of an implied or an express contract, his breach of the implied covenant of good faith and fair dealing claim also fails.

III. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

Malone's cause of action for wrongful termination in violation of public policy requires him to show: (1) he was employed at Merle Norman; (2) Merle Norman dismissed

him; (3) the alleged violation of public policy was a motivating factor in his discharge; and (4) the discharged caused harm. (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 641, citing Judicial Council of Cal. Civ. Jury Instns. (2004) CACI No. 2430; BAJI Nos. 10.06, 10.41, 10.42 & 10.43.) Here, Merle Norman asserts Malone has failed to allege there was a nexus between Malone's complaints and his termination. We disagree.

In *Tameny v. Atlantic Richfield Co*. (1980) 27 Cal.3d 167, 169–170, the Supreme Court held that employees may bring an action in tort when their discharge contravenes the dictates of fundamental public policy. As the tort is predicated on public policy, rather than the terms and conditions of the employment relationship, an employee may assert it whether his employment is "at-will" or is based on an employment contract for a specified term. (*Foley, supra*, 47 Cal.3d at p. 667.) To recover in tort for wrongful discharge in violation of public policy, the plaintiff must show the employer violated a public policy affecting "society at large rather than a purely personal or proprietary interest of the plaintiff or employer." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090.) In addition, the policy at issue must be substantial, fundamental, and grounded in a statutory or constitutional provision. (*Id.* at pp. 1089–1095.) Consistent with these principles, courts recognize tortious wrongful discharge claims where an employee establishes he or she was "terminated in retaliation for reporting to his or her employer reasonably suspected illegal conduct . . . that harms the public as well as the employer." (*Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1119–1120.)

A *Tameny* claimed is stated where the employee was terminated for (1) refusing to violate a statute, (2) performing a statutory obligation, (3) exercising a constitutional or statutory right, or (4) reporting a statutory violation for the public's benefit. (*Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal.App.4th 1105, 1112.)

A plaintiff cannot merely show he or she engaged in whistle-blowing activities that were followed at some point by his termination. To establish a claim for wrongful termination in violation of public policy, the employee must also "demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse

treatment." (*Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1258, overruled on other grounds in *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498.) Thus, an employee cannot establish a retaliatory discharge without evidence the employer knew the employee engaged in protected activity. This requirement is "rooted in the commonsense notion that one cannot be motivated by an event or condition of which one is wholly ignorant." (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 107, 110.) Where the employer has no knowledge of the employee's protected activities, "no act by the employer can be said to have been taken 'because of' those activities." (*Id.* at p. 107.)

Here, Malone's second amended complaint generally alleges that "In retaliation for plaintiff's complaints concerning Federal Aviation Regulations, adopted for the benefit of pilots, passengers, and the general public, and plaintiff's complaints concerning the denial of a safe place to work, and out of fear that if he continued to be employed he would advise the FAA and other agencies of these violations, Defendant wrongfully terminated Plaintiff's employment and denied him further employment."

Malone alleged that he reported FAA regulation violations to his immediate superiors, Goldman and Sirota; he alleged he believed Sirota was fired for relaying Goldman's concerns to Merle Norman's board and officers, and that Goldman was fearful for his own position and therefore did not relay his concerns to Merle Norman's board or officers. The trial court found this failed to establish a nexus between his termination and his protected activities because he could not establish that Merle Norman's board or officers actually knew of his reporting. However, at the demurrer stage we construe pleadings liberally, and conclude Malone has sufficiently alleged a claim for wrongful termination in violation of public policy. Although Malone is not able to allege that those at Merle Norman who had the authority to terminate him actually had knowledge of his reporting activities, for purposes of evaluating a complaint on demurrer, we can infer this knowledge from the circumstances alleged: He reported violations to his immediate superiors; those superiors were allegedly fired because of

reporting his concerns or did not report his complaints out of fear for their own jobs; and Malone was ultimately terminated by those with authority to do so.[4]

While we find that plaintiff has stated a cause of action in count four under the prevailing pleading standards, we make no finding as to the merits of that claim.

DISPOSITION

The portion of the judgment of the superior court dismissing Malone's claim for wrongful termination in violation of public policy is reversed; in all other respects, the judgment is affirmed.

The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J. ROTHSCHILD, J.

---

[4] At oral argument, Malone cited *Columbia Pictures Corp. v. DeToth* (1948) 87 Cal.App.2d 620 for the proposition that the knowledge of an agent can be imputed to the principal in the context of tortious termination of employment in violation of public policy. On that basis he contends that his reports to Sirota and Goldman are imputed to Merle Norman for purposes of establishing a nexus based upon their knowledge of his complaints. His argument is misguided. *Columbia Pictures* held that where an entertainment agent had knowledge of the provisions of a studio's standard employment contract, such knowledge would be imputed to the agent's principal for purposes of determining whether an oral contract between the principal and the studio which incorporated such standard contract was binding on the principal. (*Id.* at p. 630–631.) We decline to impute Goldman's knowledge of plaintiff's complaints of regulatory violations to Merle Norman in the context of a claim for wrongful discharge in violation of public policy because the necessary nexus requires a showing of actual knowledge plus intent to discharge based upon such knowledge. (*Reeves v. Safeway Stores, Inc.*, *supra*, 121 Cal.App.4th at p. 107 ["if a worker's protected activities are completely unknown to his or her employer, no act by the employer can be said to have been taken 'because of' those activities."].)